

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

TRI-COUNTY ARC, INC.

Employer/Petitioner

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, SEIU, AFL-CIO

Union

Case No. 34-UC-125

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.
4. The Employer filed the instant petition to clarify the bargaining unit currently represented by the Union to specifically exclude from the unit eight individuals who occupy positions as Residential Supervisors and Day Service Supervisors (herein collectively referred to as the Supervisors).¹ The Union opposes the Employer's petition on the ground that the petition is untimely. In this regard, the Employer, contrary to the Union, contends that since the parties signed their most recent collective bargaining

¹ The positions are also referred to as Senior Residential Counselors and/or Senior Employment Counselors.

agreement, substantial changes to the job duties and responsibilities of the Supervisors have made them statutory supervisors within the meaning of the Act which warrants their exclusion from the bargaining unit.

The Employer, a non-profit Connecticut corporation with its administrative offices located in Columbia, Connecticut, and with various sites located throughout northeastern Connecticut, provides “residential and day services” to people with developmental disabilities. The Union has been voluntarily recognized by the Employer since at least 1988. The most recent collective bargaining agreement is effective from April 1, 1999 through April 1, 2003, and describes the unit as:

All direct care staff and day program staff; but excluding Executive Director, Assistant Executive Director, Residential and Day Services Directors, Residential and Day Services Managers, Confidential Clerical, Quality Assurance Nurse, Community Business Specialist and Business Manager.

While it is clear that the disputed Supervisors are included in the bargaining unit,² there is no evidence that the parties ever agreed that they were supervisors within the meaning of the Act. There is also no evidence that during contract negotiations either party reserved the right to contest the status or placement of the Supervisors through a unit clarification petition.

With regard to the supervisory responsibilities of the Supervisors at the time the current contract was signed, the record reveals that from at least 1999 until about February 2000, one Supervisor was assigned to each of the Employer’s four group homes and three day programs. Each Supervisor was responsible for directly overseeing the direct care employees working at their location. The Supervisors reported directly to a Manager who was located at the Employer’s main office. There is no dispute that when the current contract was entered into none of the Supervisors had any involvement in the hiring or termination of employees. The record further reflects that prior to the execution of the current agreement, the Managers were responsible for scheduling employees, monitoring their attendance, and granting time off requests, and that the Supervisors needed prior approval from a Manager to schedule overtime or to

² Although the contract’s unit description does not mention this position, it does provide wage rates for these individuals who are designated “Supervisors (Residential and Day Services).”

require employees to stay for a second shift. With regard to discipline, although the Supervisors were responsible for informing the Manager about employee misconduct, there is no evidence that they made any recommendation as to whether employees should be disciplined. Rather, the Managers independently determined whether employees should be disciplined, and the Supervisors communicated such discipline to the employees. With regard to evaluations, the Supervisors prepared the evaluations, submitted them to the Managers for input and approval, and then provided it to the employee.³ On a regular basis, Supervisors filled in for other unit employees, which the record generally described as direct care staff, in the event of short staffing. Other than being paid on a salaried basis, the Supervisors received the same benefits and were subject to the same terms and conditions of employment as all other employees covered by the collective bargaining agreement.

On September 21, 1999, the Employer's Board of Director's met to consider a restructuring of its operations. One aspect of the restructuring invested the Supervisors with more responsibilities, including overseeing two homes instead of one. In conjunction with this change, Lead Counselors were assigned to each home and report directly to the Supervisors.⁴ It appears that these changes were implemented sometime after February 2000, and that the Lead Counselors were in place by May or June 2000.

Since the restructuring, the Supervisors have had the authority to interview and independently hire applicants. Supervisors also review the performance of probationary employees and determine if their probationary period should be extended or if they should be retained or severed. The Supervisors now independently decide, without prior approval or review by a Manager, if discipline is warranted and the level of discipline to be issued, up to and including termination. The Supervisors also prepare and present evaluations to employees without the prior input or approval of a Manager. Although promotions are governed by the contract which dictates that the "most senior qualified" employee be promoted, it appears that the evaluations can play a role in determining whether an applicant is "qualified" for promotion. Since the restructuring,

³ The Union's organizer testified that while she was employed as a Residential Supervisor for a single group home in Stafford, CT from 1996 to early 2000, she scheduled, evaluated, and disciplined employees without any prior approval from a Manager.

Supervisors have been responsible for tracking the attendance of unit employees assigned to their location. They have the authority to independently grant or deny time off, authorize overtime, and are now solely responsible for scheduling. In this regard, Supervisors may assign overtime without prior approval from a Manager and have the authority to require employees to remain after the conclusion of their shift. Finally, Supervisors now rarely perform bargaining unit work by filling in for direct care staff in the event of short staffing. No changes were made to the Supervisor's job description or other terms and conditions of employment since the restructuring.

It is well established that a unit clarification petition filed during the term of a collective bargaining agreement which specifically covers the disputed classification will be dismissed if the party filing the petition did not reserve its right during the course of bargaining to file a unit clarification petition. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). Thus, the Board will not clarify a bargaining unit during the life of a collective bargaining agreement where it would change the composition of a contractually agreed-upon unit (*Edison Sault Electric Co.*, 313 NLRB 753 (1994)), even where the disputed classification involves a statutory exclusion such as a supervisor. *Bethlehem Steel Corp.*, 329 NLRB 243, 244, fn.5 (1999), citing *Shop Rite Foods, Inc.*, 247 NLRB 883 (1980); *Peninsula Hospital Center*, 219 NLRB 139, 140 (1975); *Wallace Murray*, supra. See also, *Gratiot Community Hospital*, 312 NLRB No. 160 (1993). However, the Board will entertain a unit clarification petition during the life of a collective bargaining agreement where a new job classification is created during the life of the agreement, or where the job duties and responsibilities of an existing job classification have undergone recent, substantial change so as to create a real doubt as to whether the individuals in such classification should remain in the unit. *Union Electric Co.*, 217 NLRB 666 (1975).

Based upon the foregoing and the record as a whole, I find that the job duties and responsibilities of the Supervisors have undergone such a substantial change as to require their exclusion from the bargaining unit as supervisory employees within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note particularly the absence of any evidence that the parties had previously included the Supervisors in the

⁴ Although not entirely clear, it appears that some type of lead counselor position existed prior to 2000.

unit with the understanding that their duties encompassed those envisioned under Section 2(11) of the Act, and that the record contains conflicting evidence as to whether they actually performed such supervisory duties at the time the current contract was negotiated. Most importantly, the record clearly establishes that since the most recent collective bargaining agreement was signed and as a result of the Employer's restructuring, the Supervisors now have the authority, in the interest of the Employer and through the exercise of independent judgment, to hire, assign, evaluate and discipline employees. Such changes are substantial and require the exclusion of the Supervisors from the bargaining unit. *Union Electric Co.*, supra.

Accordingly, I shall grant the Employer's request to clarify the unit to exclude the Supervisors.

ORDER

IT IS HEREBY ORDERED that the unit in which the Union is currently the recognized collective bargaining representative be, and it hereby is, clarified to exclude Residential Supervisors and Day Services Supervisors.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by November 30, 2001.

Dated at Hartford, Connecticut this 16th day of November, 2001.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board

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